

31864  
EB

SERVICE DATE - MAY 15, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34040

RIVERVIEW TRENTON RAILROAD COMPANY – PETITION FOR AN EXEMPTION  
FROM 49 U.S.C. 10901 TO ACQUIRE AND OPERATE A RAIL LINE IN WAYNE  
COUNTY, MI

Decided: May 9, 2003

We are granting the petition of Riverview Trenton Railroad Company (RTR) for an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to acquire and operate a line of railroad in Wayne County, MI, subject to environmental and monitoring conditions and the requirement that RTR designate a community liaison.

BACKGROUND

In this proceeding, RTR has filed a petition for an individual exemption, under the procedures set forth at 49 CFR Part 1121, to acquire and operate a line of railroad in Wayne County, MI. This proceeding involves the same proposal as the one presented to us in STB Finance Docket No. 33980, Riverview Trenton Railroad Company–Acquisition and Operation Exemption–Crown Enterprises, Inc., under the class exemption at 49 CFR 1150.31 *et seq.*, and incorporates the record in that earlier proceeding, as well as the additional evidence and arguments filed in this proceeding. The background, issues, and record in these proceedings are explained in greater detail in our decision in STB Finance Docket No. 33980, *et al.*, served on February 15, 2002.

The Initial Pleadings. RTR seeks to acquire and to operate over track located in the towns of Riverview and Trenton, in Wayne County, MI. Specifically, RTR plans to operate over: (1) 1.5 miles of rail line on its own property, a 76-acre parcel that RTR purchased from its noncarrier parent, Crown Enterprises, Inc. (Crown);<sup>1</sup> and (2) via easement, track within an

---

<sup>1</sup> Crown is a real estate development subsidiary of CenTra, Inc. (CenTra). CenTra is a holding company that also owns several transportation companies, including a trucking company, Mason Dixon Lines, Inc. In STB Finance Docket No. 33979, CenTra, Inc., et al.–Continuance in Control Exemption–Crown Enterprises, Inc., CenTra filed a notice of exemption under 49 CFR 1180, to permit it to control RTR, when RTR becomes a rail carrier, along with the Jefferson Terminal Railroad Company (Jefferson), another subsidiary of Crown that had filed a notice of exemption in Jefferson Terminal Railroad Company–Acquisition and Operation Exemption–Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19,

(continued...)

adjacent 195.45-acre industrial site owned by a non-affiliate, Detroit Steel Center, Ltd. (DSC).<sup>2</sup> DSC currently moves its own traffic over RTR's track,<sup>3</sup> and was moving it over this portion prior to the creation of RTR.<sup>4</sup> RTR plans to establish an intermodal terminal involving rail, motor, and possibly barge traffic and also plans to transport DSC's traffic.

RTR indicates that it has initiated discussions with other railroads for the interchange of traffic. The track in RTR's 76-acre parcel physically connects at two points with track owned by a CN subsidiary, the Grand Trunk Western Railroad (GTW).<sup>5</sup> RTR claims that, after appropriate interchange arrangements are made, it will have access to track of the Consolidated Rail Corporation (Conrail) Detroit Shared Assets Area.<sup>6</sup>

RTR's invocation of the class exemption in STB Finance Docket No. 33980 attracted local opposition and generated a substantial record. As explained in more detail in our February 2002 decision, RTR's opponents alleged that RTR's real purpose was to block condemnation of the property for public purposes, rather than to develop it for rail use. GTW also argued that our class exemption procedure was not intended to encompass operations where a start-up carrier like

---

<sup>1</sup>(...continued)

2001) (Jefferson Terminal). We revoked the Jefferson Terminal exemption at the request of the City of Detroit.

<sup>2</sup> RTR's 76-acre parcel and the adjacent parcel owned by DSC were formerly owned by the McLouth Steel Company (McLouth), which used the track therein to service its plant. On its property, DSC operates a steel mill.

<sup>3</sup> DCS and RTR have easements to use the track on each other's property.

<sup>4</sup> In a letter dated April 16, 2001, DSC asserted that it was transporting 15-20 carloads/month but that it expected to be transporting 50 carloads/week within 6 months. Mistura Exh. 2, attached to RTR's supplemental statement filed on March 7, 2002. According to DSC, the Canadian National Railway Company (CN) operates over its track.

<sup>5</sup> The grade-separated connection at the south end of the property is active, passing over Jefferson Avenue. The street level (crossing Jefferson Avenue) connection at the north end has been paved over and may require reconstruction to become operable. See the affidavit of James M. Kvedaras, attached to Wayne County's Petition to Revoke filed on February 16, 2001, Tab K, and the photographs in the Environmental Assessment served on October 15, 2001.

<sup>6</sup> Pursuant to our decision allowing division of the operations and properties of Conrail between Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc. (CSXT), Conrail continues to operate this track in the Detroit area for the benefit of both NSR and CSXT. See CSX Corp. et al.-Control-Conrail Inc. et al., 3 S.T.B. 196 (1998).

RTR would be developing an entirely new service over track that has lain dormant. the class exemption because the property is not subject to our jurisdiction. In any event, they argued, the class exemption should be revoked under the statutory criteria for revocation set forth in 49 U.S.C. 10502(d), or at least be subjected to a proper investigation of environmental issues.

On May 1, 2001, RTR, attempting to put to rest any concerns about its use of our class exemption procedure, filed the instant petition for an individual exemption for the same proposal. Attached to RTR's petition in STB Finance Docket No. 34040 was an environmental report containing environmental information about the proposal.

Because RTR did not withdraw its notice in STB Finance Docket No. 33980, invoking the class exemption, the parties continued to file pleadings arguing whether that exemption should be revoked. By decision served on February 15, 2002, we revoked the use of the class exemption in STB Finance Docket No. 33980. We found that the proposal warrants more detailed scrutiny than was afforded by the existing record in that proceeding. Our decision stated that we would consider all of the arguments submitted in STB Finance Docket No. 33980, to the extent such material was not addressed in the February 2002 decision, when we considered RTR's petition for individual exemption. We also allowed the parties to file supplemental statements and replies in STB Finance Docket No. 34040.<sup>7</sup>

The Environmental Review Process. On October 15, 2001, our Section of Environmental Analysis (SEA) issued for public review and comment a detailed Environmental Assessment (EA)<sup>8</sup> of RTR's proposed acquisition and subsequent intermodal operations in Wayne County.<sup>9</sup> SEA received comments on the EA from GTW, the City of Trenton (Trenton), the City of Riverview (Riverview), Wayne County Department of Public Services, and the Southeastern Michigan Council of Governments. SEA addressed those comments in a Post Environmental Assessment (Post EA), which was placed in the public docket on January 22, 2002. The Post EA

---

<sup>7</sup> Because members of the affected public have already had substantial opportunity to address the issues raised in this docket, we did not publish a notice requesting public comments under 49 CFR 1121.4.

<sup>8</sup> SEA prepared an EA in this case because RTR's proposed actions would add a maximum of 300 trucks per day to local roads, exceeding the Board's 50 or more trucks-per-day threshold for the preparation of environmental documentation at 49 CFR 1105.7(e)(4), (5).

<sup>9</sup> Issues considered included safety, land use, social and economic effects, physiography and soils, water and biological resources, transportation systems (including local roadways, highway/rail at grade crossings, traffic delay, and emergency response delay), energy, navigation, air quality, noise, cultural resources, recreational and visual resources, "environmental justice" demographics, and cumulative effects.

found that, with the imposition of the conditions to mitigate the environmental impact of the proposed actions recommended in the Post EA, RTR's proposal would not significantly affect the environment. Shortly after issuance of the Post EA, a public meeting attended by approximately 500 persons was held in Southgate, MI, where many expressed concern about adverse effects to their communities and their hopes to convert the proposed project area to non-industrial use. After the meeting, the Board received approximately 1700 letters raising concerns of private citizens and government officials. In response SEA prepared a Supplemental Post EA (which was placed in the public docket on August 28, 2002) that reaffirmed SEA's original conclusion that the proposed action would not significantly affect the environment if the conditions SEA had recommended in the Post EA were imposed.

Riverview filed a motion on April 21, 2003, which RTR opposed, asking that we prepare a supplemental EA that considers the environmental impacts associated with a barge facility that the City believes RTR will locate on the Detroit River adjacent to its intermodal facility.<sup>10</sup> As RTR stated, SEA did not evaluate in its EA potential environmental impacts resulting from increased barge traffic due to its speculative nature. SEA explained that RTR has no specific plans to introduce barge service, and, therefore, there would have been no way for SEA to effectively analyze it.<sup>11</sup>

We have carefully reviewed the EA, Post EA, and Supplemental Post EA (collectively, the EA) and Riverview's April 21, 2003 motion. We find that SEA properly declined to consider barge traffic in the EA, and that there is no need to prepare a Supplemental EA here. We are adopting the analysis and conclusions in the EA as our own and are imposing the conditions recommended by SEA.<sup>12</sup> The scope of the analysis in the EA was adequate, and the EA provided

---

<sup>10</sup> On May 6, 2003, the Grosse Ile Bridge Company filed a letter in support of Riverview's request for a Supplemental EA evaluating the potential impacts from barges on Grosse Ile residents.

<sup>11</sup> Riverview also alleges that RTR's proposal has substantially changed, based on affidavits describing conversations that allegedly took place during settlement negotiations. But affidavits related to unsuccessful negotiation proposals plainly do not demonstrate that this proposal has changed. Accordingly, the EA is fully adequate, and we see no need to conduct further environmental review.

<sup>12</sup> We have made minor changes to SEA's recommended environmental conditions to clarify them. The most significant change is to amplify and clarify the fourth condition in the Post EA. The new condition (No. 4) makes it clear that, in response to concerns raised by the Wayne County Department of Public Services, regarding storm water management, soil erosion, and sediment control, RTR shall ensure that its development of the site complies with the

(continued...)

the appropriate environmental documentation required by the National Environmental Policy Act for this project.

Positions of the Parties. On March 7, 2002, the County of Wayne (Wayne County), Trenton, and GTW (the Joint Opposition) jointly filed a statement, which Riverview has supported, urging us to deny the individual exemption petition. Attached to Riverview's supporting statement was a copy of Riverview's "Master Plan of Future Land Use." The Joint Opposition continues to argue that: (1) RTR is improperly seeking to invoke our jurisdiction to avoid local land use regulation rather than for legitimate transportation purposes; (2) the project would have adverse environmental effects on local traffic and safety; (3) the rail transportation policy of 49 U.S.C. 10101 requires that we consider local desires to put the property to recreational or other "quality-of-life" uses that serve local residents more than interstate transportation, i.e., uses such as the proposed "Riverfront Greenway" development along the Detroit River; and (4) we lack jurisdiction over the proposed operation and thus have no jurisdiction to authorize RTR's project through an exemption.

RTR also filed an opening supplemental statement on March 7, 2002. RTR explained that it has been planning its rail facility, which is in a primarily industrial area, since at least early 2000, and that local officials were well aware of its plans prior to the county's taking exploratory eminent domain action in late 2000. RTR argued that it had met the statutory standards for exemption authority. It stated that its proposed operations fall within the Board's jurisdiction because RTR will hold itself out to the shipping public to provide transportation and interchange services. RTR stated that, consistent with its intent to provide common carrier service, it has invested substantial resources in preparation to rehabilitate the line and construct additional track for the intermodal facility. RTR submitted supporting statements from auto manufacturers and other shippers, motor carriers, and logistics and ocean carrier interests. RTR also submitted witness statements arguing that the planned intermodal terminal is feasible, will have important transportation benefits, and will benefit the environment by diverting traffic from trucks to railroads.

On March 8, 2002, the Grosse Ile Bridge Company (the Bridge Company) filed a statement in opposition to the exemption. The Bridge Company operates a toll bridge that connects Riverview and Trenton to the nearby Detroit River island residential community of Grosse Ile. The Bridge Company maintains that RTR's terminal would create traffic congestion that would interfere with use of the bridge.

---

<sup>12</sup>(...continued)

Michigan Natural Resource & Environmental Protection Act, and the Wayne County Storm Water Management Ordinance, to the extent that this does not unreasonably interfere with RTR's ability to go forward with this rail transportation project.

On March 21, 2002, RTR filed its reply statement. Addressing opponents' argument that we should allow local jurisdictions to put the property to non-rail use, RTR argues that: (1) the Interstate Commerce Act restricts our evaluation to the transportation considerations mentioned in the rail transportation policy, these considerations have been satisfied, and they do not allow us to act as a local zoning agency or to weigh non-transportation uses of RTR's property; (2) the non-transportation uses and alternate terminal location mentioned by opponents are wish lists rather than feasible, concrete, and funded plans;<sup>13</sup> and (3) the plans of the local communities could not be realized even if we were to deny RTR's petition because (a) those plans would require that DSC and the numerous surrounding industrial properties also be condemned and (b) DSC is still operating rail track that may not be condemned. RTR also reasserted that we have jurisdiction over the transaction and that the project is a genuine attempt to commence rail service.

In a reply statement filed on March 21, 2002, the Joint Opposition continues to question our jurisdiction over the transaction. Their jurisdictional argument is premised on their assumption that RTR would not be providing common carrier services but, rather would be operating an intermodal terminal only for its own purposes. The Joint Opposition also argues that RTR's evidence improperly points to the general benefits of an additional intermodal terminal in the area, rather than the benefits of conferring common carrier status on RTR. They argue that the shipping needs of the Detroit area would be better met by construction of a "world class freight transportation hub" at a different location. The Joint Opposition criticizes the supporting statements submitted by RTR, arguing that: (a) they are merely form letters; (b) some of them incorrectly purport to represent the views of the entire company rather than the lower-level officers signing them; and (c) they express weak commitment to use of the terminal.

On March 22, 2002, CSXT tendered a late-filed comment and a request on the cover letter that we accept it.<sup>14</sup> That carrier states that it "neither opposes nor supports the proposed transaction," but it expresses concern about the possibility that volumes might turn out to be too low to justify the expense of interchange. CSXT asserts that it has not yet meaningfully discussed interchange terms with RTR and for that reason urges us to retain jurisdiction over any "regulated transportation-related matters" that may arise out of a grant of operating authority to RTR, such as interchange and switching relationships.

---

<sup>13</sup> The opponents to this project acknowledge that there is as of yet no timetable for any taking of this property that the County might decide to pursue.

<sup>14</sup> We will accept CSXT's late-filed comment because it prejudices no party and will not delay the proceeding.

On the same date, GTW filed an unauthorized one-page reply-to-a-reply, disputing RTR's argument that opponents have failed to address legal precedents allegedly supporting RTR's position.

By decision served on June 21, 2002, given the willingness to negotiate indicated by each side at that time, we held the proceeding in abeyance, in the hope that the parties could resolve their differences through good faith negotiations to reach a mutually acceptable solution, and directed them to file reports on the status of the negotiations within 90 days. The negotiations did not produce a settlement or any meaningful signs of progress towards one. Each side filed the requested 90-day status reports and, following that, numerous other status reports. In these reports, each party attempted to support its own positions and to blame the other side for lack of progress. On December 6, 2002, RTR filed a document stating that an impasse had been reached and requesting that we act.

On February 28, 2003, Riverview filed a letter stating that further negotiations might be fruitful and asking us to determine "whether further negotiations are intended." By letter filed on March 4, 2003, RTR replied in opposition to any further delay. Given the lack of progress on the parties' negotiations, it is appropriate to issue our decision in this matter at this time.

## DISCUSSION AND CONCLUSIONS

We find that we have jurisdiction over the transaction, and we will grant the requested exemption, subject to mitigation conditions developed during the environmental review process. We understand the desire by some opponents to enhance the recreational and aesthetic nature of RTR's parcel, but our statutory responsibility is to assess the transportation merits. Nonetheless, in response to the concerns of the opponents, we will impose on RTR a monitoring and reporting condition designed to ensure that we are kept advised of RTR's progress in implementing its project and to allow us to reopen and revisit the matter and take appropriate action if RTR does not follow through on the representations it has made in this proceeding regarding the development of rail service on this property. To facilitate future interaction between RTR and local communities, we will also impose a condition requiring RTR to designate a community liaison.

### Jurisdiction

Under the licensing provisions of 49 U.S.C. 10901, a noncarrier (such as RTR) may acquire a rail line and operate as a common carrier only if we find that the proposal is not inconsistent with the "public convenience and necessity," or if we exempt the transaction from the requirements of section 10901 pursuant to 49 U.S.C. 10502. Throughout this proceeding, RTR's opponents have argued that we lack jurisdiction over the proposed acquisition and operation because RTR's track is excepted "spur, industrial, team, switching, or side tracks"

under 49 U.S.C. 10906.<sup>15</sup> GTW adds that jurisdiction may be lacking because the track may be private track. Wayne County and GTW also maintain that the RTR transaction is not subject to our general jurisdiction under 49 U.S.C. 10501 because RTR's proposed intermodal facility would not be a railroad common carrier operation. Because the jurisdictional issues were not resolved in STB Finance Docket No. 33980, we will resolve them here.

Based on our consideration of all of the parties' evidence and arguments, we find that the transaction proposed by RTR is subject to our jurisdiction under 49 U.S.C. 10901. RTR will not be hauling its own goods. Rather, it will be providing transportation for hire analogous to the regulated services provided in Assoc. of P&C Longshoremens v. The Pitts & Conneault, 8 I.C.C.2d 280 (1992) (P&C Dock) (terminal type rail operations comprise "all movements of railway cars and locomotives in yards") and Effingham<sup>16</sup> (any line that becomes the entire line of a new rail common carrier requires Board authority).

In attempting to show that the track is excepted track under section 10906, Wayne County and GTW focus on the past (pre-notice) use of the track. They explain that previously the track was owned by a non-railroad, McLouth, and used by GTW to switch cars between McLouth's plant and connections with line haul common carriers.<sup>17</sup> They also point out that RTR does not claim that any common carrier had ever leased or had trackage rights over the track.

In determining whether track is excepted track under section 10906, however, we must focus on its intended or future use under the transaction at issue, which may differ from its past use. Nicholson v. I.C.C., 711 F.2d 364, 367-68 (D.C. Cir. 1983) (Nicholson). If track – even track that is used for purposes such as switching – (1) will constitute the entire operation of the new carrier; (2) permits the using carrier to extend operations into, or invade, new territory, and thereby alter the competitive balance between railroads; and/or (3) is essential to the through

---

<sup>15</sup> The general licensing requirements of section 10901 do not apply to track that is excepted under section 10906, although we retain exclusive jurisdiction over such track pursuant to 49 U.S.C. 10501(b)(2).

<sup>16</sup> Effingham RR Co.–Pet. For Declaratory Order, 2 S.T.B. 606 (1997), reconsideration denied, STB Docket No. 41986 (STB served Sept. 18, 1998), aff'd, United Transp. Union v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999) (Effingham).

<sup>17</sup> The record does not indicate that McLouth was ever certificated to operate as a common carrier. In his statement attached to RTR's reply filed on April 2, 2001, RTR witness B. Michael Blashfield asserts that an official of McLouth told him that GTW served McLouth's plant by operating over its tracks.



movement of traffic from shipper to consignee, then it is deemed to be a railroad line subject to Board licensing requirements, rather than excepted spur or auxiliary track.<sup>18</sup>

RTR's intended use of the track meets each of these three criteria. The track will comprise RTR's entire operation. RTR plans to start up an intermodal terminal that will create new competition with intermodal facilities owned by other railroads in the Detroit area. RTR will connect and interchange containers and DSC traffic with the national rail system, first at its south end connection and perhaps later (after track reconstruction) at its north end.

Moreover, RTR will be providing railroad transportation as a common carrier. The record indicates that RTR intends to hold itself out to provide service to the general public, rather than to operate as a private carrier or a switching agent for line haul carriers.<sup>19</sup> Using its rail connections with other established railroad common carriers and motor carriers providing local drayage service,<sup>20</sup> RTR's terminal will play a part in the interstate transportation of goods before they reach their place of rest. To do this, RTR will use equipment and facilities that are part of rail service.<sup>21</sup>

---

<sup>18</sup> See Texas & Pacific Ry. v. Gulf Colorado & S.F. Ry., 270 U.S.C. 266, 278 (1926); Effingham; United Transp. Union v. STB, 169 F.3d 474, 477-78 (7th Cir. 1999); Great Salt Lake and Southern Railroad, L.L.C.—Construction and Operation—In Tooele County, UT, STB Finance Docket No. 33824 (STB served Dec. 15, 2000) (track construction subject to regulation because it would allow service to a new market and constitute the carrier's entire line); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66, (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967) ("If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad' or extension thereof."); Nicholson, 711 F.2d at 368.

<sup>19</sup> RTR asserts that it will offer a common carrier service to "all shippers" (not just DSC), and that in this respect it will be "no different from any other terminal railroad." Statement of B. Michael Blashfield, at 9, attached to RTR's reply filed on March 8, 2001. RTR also has supported its petition with evidence from shippers stating that they wish to have the service available. Statements by opponents indicate that plans exist for another intermodal terminal in the Detroit area, which supports RTR's claim that there is a market for its service.

<sup>20</sup> Statement of B. Michael Blashfield, at 3, attached to RTR's reply filed on March 8, 2001: "The new facility will receive containers and trailers on flat cars (for example) to be loaded and unloaded for interchange between motor carrier mode and rail carrier mode."

<sup>21</sup> RTR will own and lease track. RTR will purchase or lease "motive power" for the cars that will move on its track. Statement of B. Michael Blashfield, at 9. Under 49 U.S.C.

(continued...)

RTR can be a common carrier even if it neither picks up containers before, nor delivers containers after, rail shipment. There is no statutory requirement that a common carrier railroad must itself pick up from shippers, or deliver to consignees, traffic transported in intermediate stages of movements in interstate commerce. In short, RTR's operation will be similar to those of other small terminal railroad companies that are subject to our jurisdiction.<sup>22</sup>

### Exemption Criteria

Because RTR's transaction is subject to our jurisdiction, we proceed to consider the exemption request. Section 10502(a) provides that, to the "maximum extent" consistent with the rail provisions of our governing statute, we "shall exempt" a transaction from the requirements of the statute, including section 10901, if we find that: (1) regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101; and (2) either (A) the transaction is of limited scope or (B) regulation is not needed to protect shippers from abuse of market power. For the reasons discussed below, we find that the requirements of section 10502 have been met.

Rail Transportation Policy. Wayne County argues that we should deny the petition for exemption because regulation under 49 U.S.C. 10901 is necessary to carry out the rail transportation policy of 49 U.S.C. 10101.<sup>23</sup> Basically, the County does not want to have the property used for rail or industrial purposes, preferring other uses that would enhance "the recreational and aesthetic nature of the parcel,"<sup>24</sup> and better comport with surrounding communities' quality of life, public health, safety, and welfare. We recognize that the County and the local communities have a different vision for this property than RTR, and the parties have debated whether opponents' plans are achievable. But, while we understand the

---

<sup>21</sup>(...continued)

10102(6)(a) and (c), RTR's intermodal equipment, yard, and ground will be "railroad" facilities.

<sup>22</sup> See P&C Dock, where the ICC held that terminal rail movements "need not satisfy a distance threshold, nor are they limited to train formation or other related classification activity." 8 I.C.C.2d at 292. The cases cited by Wayne County are inapposite because they involved transportation that, unlike the transportation planned by RTR, was private carriage, contract carriage, or carriage exclusively for a corporate parent.

<sup>23</sup> The County also makes a separately captioned argument that regulation is necessary "due to the overriding public interest at stake." We evaluate public interest concerns as appropriate under 49 U.S.C. 10101.

<sup>24</sup> Affidavit of DeWitt Henry, attached as Tab A to the County's Petition to Revoke; Post EA at 20-21; Supplemental Post EA at 3-5.

communities' concerns, our statutory responsibility is to look at the transportation merits of RTR's proposal.

Here, RTR has developed specific plans for constructing an intermodal facility for which there is evidence of a current demand, thereby furthering the development of a rail transportation system that meets the needs of the public [§10101(4)]. RTR has taken reasonable steps to prepare for the commencement of rail operations, such as purchasing the necessary property and commissioning a rail engineering firm.<sup>25</sup> There is evidence that the Detroit area needs increased intermodal development and that RTR's project will help to meet this need.<sup>26</sup> The proposed Detroit Intermodal Freight Terminal (DIFT), relied on by opponents, is currently little more than a concept, and there are reasons to believe that the DIFT and RTR's project would both serve a transportation need. See RTR's reply filed on March 7, 2002, at 7-9.<sup>27</sup>

RTR also has submitted statements from shippers supporting its project.<sup>28</sup> RTR's opponents criticize these statements, arguing that: (a) they are merely form letters; (b) some of them incorrectly purport to represent the views of the entire company rather than the lower-level officers signing them; and (c) they express weak commitment to use of the terminal. RTR responds, however, that its efforts to elicit support have been hindered by the intense controversy connected with its transportation project. On balance, we believe that the statements show that the project is sound enough to attract some significant support under difficult circumstances.

Accordingly, we find that, based on careful consideration of the entire record, this is a legitimate rail transportation project, which should be allowed to go forward. By creating an additional rail intermodal terminal facility, the transaction will promote competition and reasonable rates [§§ 10101(1), (4), (5), (6), and (12)]. The competitive benefits of independent terminals like the one planned by RTR are documented in RTR's reply filed on March 7, 2002, v.s. of Richard J. Schiefelbein. The exemption will also minimize the need for federal regulatory control [§10101(2)] and reduce regulatory barriers to entry [§10101(7)]. The promotion of

---

<sup>25</sup> See: RTR's reply filed in STB Finance Docket No. 33980 on April 2, 2001, at 17; v.s. of Richard A. J. Duffield, attached to RTR's response filed on March 7, 2002. In light of the uncertainty created by opposition to the project, we cannot fault RTR for so far failing to invest substantial sums to implement the plans described in its notice of exemption.

<sup>26</sup> Response of RTR filed on March 7, 2002: v.s. of Arnold M. Mistura; v.s. of Richard P. Urban.

<sup>27</sup> The DIFT depends on the outcome of a lengthy environmental review process and would require public money that has yet to be dedicated.

<sup>28</sup> Exhibit No. 1 to v.s. of Arnold M. Mistura, filed separately on March 18, 2002.

energy conservation, by the development of an intermodal rail service like RTR's that can substitute for truck movements, is another rail transportation policy that supports granting the exemption [§10101(14)].

Section 10101(8) of the rail transportation policy favors the operation of transportation facilities "without detriment to the public health and safety." Riverview and Trenton assert that the intermodal facility will substantially affect the quality of life in the community and that the planned operation will block traffic, to the detriment of public health and safety. But the EA prepared by SEA here shows that (a) there are already significant rail operations in the largely industrial area in the immediate vicinity of the project, (b) for the reasonably foreseeable future, RTR does not anticipate running more than two trains per day, (c) the projected maximum of 300 additional trucks per day on local roadways represents an increase of less than 3 percent of average daily traffic, which is not significant, and (d) the prospect of street blockage will be limited. As the EA explains (at pp. 5-9 to 5-12), the primary rail access to the property is from the south over a grade-separated crossing of the primary traffic artery in the area, and we agree with SEA's conclusion that, with the environmental conditions it has recommended – including one that addresses concerns related to potential delay to emergency response providers when RTR uses its northern rail connection to access Class I railroads – the exemption will not significantly affect the quality of the human environment.<sup>29</sup>

Finally, the rail transportation policy provides no grounds for denial of the exemption to meet GTW's concern that RTR's operation might operationally interfere with GTW's operations in the area. In any event, GTW has submitted no evidence to support this concern.<sup>30</sup>

---

<sup>29</sup> Some commenters to the EA alleged that the EA does not adequately consider existing hazardous materials contamination and remediation at the proposed intermodal facility. To the contrary, the EA explained that RTR, working under the guidelines of the Michigan Department of Environmental Quality, has prepared a Due Care Plan to protect public health and natural resources during development of the site as an intermodal facility. The EA attached a copy of the Due Care Plan in Appendix C. One of our environmental conditions requires RTR to comply with the Due Care Plan. RTR also has agreed to voluntary mitigation to minimize noise.

<sup>30</sup> In a letter to us dated April 15, 2003, Michigan State Senator Raymond E. Basham requested that we defer any decision until investigative agencies responsible for border, customs, and related interstate and international commerce tied to homeland security provide written documentation that they have completed a review of the concerns related to the railroad. But RTR, like any other railroad, must comply with all applicable regulations covering homeland safety and security. Railroads are legally bound to comply with the comprehensive across-the-board safety measures adopted by the Federal agencies with jurisdiction to adopt appropriate measures to enhance the security of the rail industry as a whole, including the Transportation  
(continued...)

Abuse of Market Power. Regulation of RTR's entry into the railroad business is not necessary to protect shippers from abuse of market power. No party maintains to the contrary. Indeed, the kind of traffic that will be handled by RTR, TOFC/COFC traffic, has been exempted as a class from our regulation based on a finding that the regulation of such traffic is not necessary to protect shippers. There is no basis for us to find that regulation of RTR's entry into the TOFC/COFC business is necessary to protect shippers when the service that RTR intends does not need to be regulated. Because we have found that the proposal will not be an abuse of market power, we need not address whether the proposed exemption is limited in scope.

#### Monitoring and Reporting and Community Liaison Conditions

As discussed above, we are granting the petition for exemption because the statutory criteria have been met. Nevertheless, we are sensitive to the concerns expressed by the communities affected by this proposal. Consequently, we are reserving oversight jurisdiction over the exemption proceeding for 3 years. We will impose a monitoring and reporting condition to ensure that we are kept advised of RTR's progress in implementing its project. Should it become clear at any time during this period that RTR is not following through on the representations it has made in this proceeding regarding the development of rail service on this property, we will entertain requests to reopen and revisit this matter.<sup>31</sup> In addition, given the level of local concern regarding this project, we will also impose a condition requiring RTR to designate a community liaison to be a point of contact with local communities. The environmental and other conditions being imposed here follow.

#### Our Conditions

1. To mitigate potential delay to emergency response providers when RTR uses its northern rail connection to access Class I railroads, crossing Jefferson Avenue at grade, RTR shall notify the appropriate emergency response providers at least 2 hours prior to using the at-grade crossing at the north end of its property.

---

<sup>30</sup>(...continued)

Security Administration and the Federal Railroad Administration. The statutory requirements of these agencies apply to RTR just as they do to all other railroads. Senator Basham has raised no security issue relating to RTR's proposed intermodal terminal that is separate and distinct from homeland security issues facing the railroad industry generally. Therefore, there is no reason for us to defer action on this proposal.

<sup>31</sup> Should circumstances warrant it, opponents could file a petition to revoke this exemption or, if necessary, a request for adverse abandonment authority.

2. RTR shall comply with the terms of the comprehensive Due Care Plan (attached in Appendix C of the Environmental Assessment), which is designed to protect public health and natural resources during development of the site as an intermodal terminal facility.

3. RTR shall consult with the U.S. Department of Agriculture, Natural Resource Conservation Service, to identify and implement Best Management Practices to restrict erosion and avoid runoff to the Trenton Channel from areas where the project may disturb the soil prior to initiation of any construction or earth disturbing activities.

4. In response to concerns raised by the Wayne County Department of Public Services, RTR shall ensure that its development of the site complies with Part 91 of Act 451, Michigan Natural Resource & Environmental Protection Act, and the Wayne County Storm Water Management Ordinance of October 19, 2000, to the extent that this does not unreasonably interfere with RTR's ability to go forward with this rail transportation project.

5. As agreed to by RTR, RTR shall use landscaping such as berms and vegetation, as appropriate, to minimize noise generated by the intermodal facility.

6. As agreed to by RTR, to minimize project-related noise, RTR shall, except in unusual circumstances, conduct rail operations and intermodal facility operations between the hours of 6:00 a.m. and 10:00 p.m. Central Standard Time.

7. To ensure that we are kept aware of RTR's progress in implementing its project, RTR shall report to the Board every 6 months, beginning 6 months after the service date of this decision, on its progress, satisfaction of environmental conditions, and, when operations commence, traffic levels. These reports will be required for 3 years. This reporting will allow the Board to take appropriate action in the event that RTR does not follow through on the representations it has made regarding the development of rail service on this property.

8. RTR shall designate a community liaison from within its organization, to be a point of contact with the local community and local officials, and be available for public meetings. RTR shall provide the name and phone number of the community liaison to mayors and other appropriate local officials.

As conditioned, we find that our action here will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The exemption is granted, subject to the environmental mitigation and monitoring and other conditions set forth in this decision.

2. This decision is effective on June 14, 2003.

By the Board, Chairman Nober and Commissioner Morgan. Commissioner Morgan commented with a separate expression.

Vernon A. Williams  
Secretary

---

Commissioner Morgan, commenting:

I trust that Riverview Trenton Railroad Company intends to use the authority it has been given here for rail transportation purposes, rather than merely as a place holder to prevent the City from using the property for other purposes. Given the concerns that have been raised about this matter, I wholeheartedly support the oversight condition that has been imposed as part of our approval here today.